

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF  
BUD VOS,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB NO. 86-149

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, the appeal from Department of Ecology Notice of \$5,000 Penalty Incurred and Due No. DE 86-610, came on for hearing before the Pollution Control Hearings Board, Lawrence J. Faulk (presiding), Wick Dufford and Judith A. Bendor, at a formal hearing in Lacey, Washington, on February 26, 1987.

Appellant appeared by his attorney Benjamin L. Westmoreland; respondent appeared by Jeffrey Myers, Assistant Attorney General. Reporter Bibi Carter recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. From testimony heard and exhibits examined, the Board makes these

FINDINGS OF FACT

I

Appellant Bud Vos owns a large dairy farm (over 300 cows) in Snohomish County, just east of the town of Arlington. Vos has continuously operated the dairy farm since 1966, increasing the size of the herd over the years.

II

Respondent Department of Ecology (DOE) is a state agency charged with the administration and enforcement of the State's Water Pollution Control law, chapter 90.48 RCW.

III

With well defined bed and banks, an unnamed tributary flows along the edge of Vos's pasture land, emptying into Jim Creek, which in turn, empties into the Stillaguamish River. Jim Creek supports valuable fish habitat. Its' waters are classified as "AA" by the State of Washington.

IV

On May 7, 1986, two DOE inspectors visited the Vos farm in response to a complaint alleging water pollution. They did not observe any "no trespassing" signs. They could see into the farm from off the property. They gained access by climbing through a barbed wire fence.

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1 coliform count of 2,400 colonies per 100 ml. These instream counts  
2 for Jim Creek and the tributary were vastly higher than relevant  
3 background coliform levels.

#### 4 VII

5 The water quality standard for fecal coliform in fresh water  
6 classified AA is set forth in WAC 173-201-045(1)(c)(1)(A) as follows:

7 Fecal coliform organisms shall not exceed a geometric mean  
8 value of 50 organisms/100 ml, with not more than 10  
9 percent of samples exceeding 100 organisms/100 ml.

#### 10 VIII

11 DOE's inspector is a man with 16 years experience with water  
12 pollution problems and with enforcement of the water pollution control  
13 laws. He has conducted many dairy inspections.

14 The high coliform counts in the samples he took confirmed the  
15 presence of manure flowing from the outlet hose - a condition he could  
16 readily detect with the naked eye from the discoloration of the  
17 discharge.

#### 18 IX

19 On several occasions over the last five years the DOE has  
20 discussed at length with Mr. Vos the need to control discharges of  
21 animal wastes from his dairy farm. In December, 1982, a DOE inspector  
22 observed a flow of manure-laden water entering the unnamed tributary  
23 from Mr. Vos's dairy. In response to that incident and after  
24 discussions with Vos, DOE issued Order No. DE 83-114 on January 14,  
25

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1 1983. The Order required him to cease and and desist from all  
2 discharges of manure to the tributary and to undertake planning to  
3 prevent future discharges.

4 Following receipt of Order DE 83-114, after some prodding by DOE,  
5 Vos installed a large waste lagoon -- the source of the discharge at  
6 issue in the instant case. The lagoon was built in late 1983. The  
7 federal Soil Conservation Service (SCS) furnished design assistance.

8 In addition, the SCS in consultation with Vos, produced a waste  
9 management plan for the entire dairy which included detailed  
10 procedures for collection and disposal of wastes.

11 However, in March of 1984, DOE again detected the discharge of  
12 manure to the unnamed tributary. The source was not the new lagoon;  
13 the manure emanated from a smaller storage pit in the so-called "dry  
14 heifer area." As a result, DOE issued Order No. DE 84-210 assessing a  
15 civil penalty of \$2,500. Agency discussions with Vos about how to  
16 improve his operations, resulted ultimately in this fine being reduced  
17 to \$500, which Vos paid without acknowledging any violation of the law.

18 On a visit to the Vos farm in June of 1984, an SCS representative,  
19 noting that the lagoon was very near to capacity, became concerned  
20 that it was in danger of overtopping. He wrote to Vos about the  
21 hazard inherent in the lagoon's location adjacent to a watercourse and  
22 strongly urged immediate pump down and disposal of the manure in the  
23 lagoon. He provided a manure waste plan designed for Vos' farm,  
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1 cautioning that timely and efficient implementation was essential, and  
2 that maintenance and operation responsibilities rested with the  
3 landowner.

4 There is no evidence of any further manure discharge problems for  
5 the balance of 1984 or in 1985.

6 X

7 By the end of 1985, Vos was experiencing difficulty with the  
8 retention time in the lagoon. The design, assuming proper operation  
9 and maintenance, was for six months retention. The lagoon appeared to  
10 be filling faster.

11 He had the lagoon pumped out and the waste disposed of by a  
12 commercial pumping company in November of 1985, though the lagoon had  
13 been empty in August of that year.

14 Again he was obliged to hire a commercial pumper to dispose of a  
15 full lagoon of wastes on February 15, 1986.

16 XI

17 Nonetheless Vos maintains that he was taken by surprise by a full  
18 lagoon in early May of 1986. He asserts he was forced to pump the  
19 manure out on his field on May 7 as an emergency measure to prevent  
20 overtopping and erosion.

21 We are unconvinced by this argument. Rainfall statistics do not  
22 show that precipitation was unusually heavy in the spring of 1986 in  
23 the area. It was not proven that a sequence, which apparently did not  
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1 create an emergency in November and February, somehow created an  
2 emergency in May.

3 We find that Vos knew or should have known that his lagoon was  
4 nearing capacity in late April and early May and had adequate time to  
5 take steps to solve the problem without resorting to the discharge of  
6 manure to a watercourse. That he made a desultory last-minute effort  
7 to locate a commercial pumper does not alter our view. His efforts  
8 were too little too late. Under the circumstances any emergency was  
9 self-created.

## 10 XII

11 Vos theorizes, without factual support, that his lagoon is filling  
12 up faster than anticipated because groundwater is seeping into the  
13 depression from the bank. An expert from the SCS suggests that the  
14 problem is a failure to properly maintain and operate the lagoon  
15 resulting in reduced storage capacity. Evidence was presented to that  
16 effect. Whatever the explanation may be, we find in the relatively  
17 rapid filling of the lagoon nothing which tends to excuse the pumping  
18 of the manure onto the ground near to the tributary on May 7, 1986.

## 19 XIII

20 On June 27, 1986, DOE issued Notice of Penalty incurred and due  
21 No. DE 86-610. This document in pertinent part provides:

22 Notice is hereby given that you have incurred, and  
23 there is now due you, a penalty in the amount of \$5,000  
24 under the provisions of RCW 90.48.144.

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1 On May 7, 1986, Mr. Bud Vos permitted animal waste  
2 from his dairy to enter Jim Creek and a tributary to Jim  
3 Creek in violation of RCW 90.48.080 and Order No. DE  
4 83-114.

5 The notice does not state that prior to its issuance the agency  
6 considered whether an enforcement action would contribute to the  
7 conversion of agricultural land to non-agricultural uses. However, we  
8 find that DOE did consider this matter before issuing the notice.

9 XIV

10 On July 8, 1986, Mr. Vos applied to the Department of Ecology for  
11 a relief from the penalty. On July 29, 1986, the Department of  
12 Ecology denied relief.

13 Feeling aggrieved by this decision, appellant appealed to this  
14 Board on August 28, 1986.

15 XV

16 Since the events of May 7, 1986, appellant Vos has purchased a  
17 pump and sprinkler apparatus which can be used when the lagoon nears  
18 capacity to lower the level without discharging to a watercourse.  
19 However, he has been less than diligent in pursuing a permanent  
20 solution to the problem of retention time in his lagoon.

21 XVI

22 Any Conclusion of Law which is deemed a Finding of Fact is hereby  
23 adopted as such.

24 From these Findings of Fact, the Board comes to these

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1 CONCLUSIONS OF LAW

2 I

3 The Board has jurisdiction over these matters and these parties.  
4 Chapter 90.489 RCW, Chapter 43.21B RCW.

5 II

6 "Waters of the State," as defined by RCW 90.48.020:

7 . . . shall be construed to include lakes, rivers,  
8 ponds, streams, inland waters, underground waters, salt  
9 waters and all other surface waters and watercourses  
within the jurisdiction of the State of Washington.  
(Emphasis added).

10 We conclude that Mr. Vos's discharge of wastes on May 7, 1986,  
11 was to waters of the state. See CH20 v. DOE, PCHB Nos. 84-182, 85-66  
12 (December 31, 1985); Delbert Meyer v. DOE, PCHB No. 83-13 (May 3,  
13 1985).

14 III

15 Appellant has sought exclusion of all testimony and other  
16 evidence flowing from DOE's May 7, 1987 inspection on the grounds  
17 that an unconstitutional search and seizure was involved.  
18

19 A record was made concerning the facts relevant to this issue,  
20 but the Board is without power to resolve constitutional questions.  
21 Yakima County Clean Air Authority v. Glascam Builders, 85 Wn.2d 255,  
22 534 P.2d 33 (1975).

23 We are obliged to assume the constitutionality of the statutes  
24 involved in the cases brought before us. Our decision here, then,  
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1 assumes the constitutionality of RCW 90.48.090, which reads:

2 The [Department of Ecology] or its duly appointed agent  
3 shall have the right to enter at all reasonable times in  
4 and upon property, public or private, for the purpose of  
5 inspecting and investigating conditions relating to the  
6 pollution of or the possible pollution of any waters of  
7 this state.

8 We conclude that the entry and inspection on Vos's land of the  
9 DOE's inspectors was proper under the statute, and on that basis, have  
10 considered the evidence derived therefrom.

11 We express no opinion on whether the warrantless administrative  
12 search and seizure was constitutionally reasonable under the "open  
13 fields doctrine" or on any other basis. See Air Pollution Variance  
14 Board v. Western Alfalfa Corp., 416 U.S. 861 (1974); Oliver v. United  
15 States, 466 U.S. 170 (1984); State v. Crandall, 39 Wn.App. 849, 697  
16 P.2d 250 (1985); Compare with Marshall v. Barlow's Inc., 436 U.S. 307  
17 (1978).

#### 18 IV

19 RCW 90.48.080 states:

20 It shall be unlawful for any person to throw, drain, run,  
21 or otherwise discharge into any of the waters of this  
22 state, or to cause, permit or suffer to be thrown, run,  
23 drained, allowed to seep or otherwise discharged into  
24 such waters any organic or inorganic matter that shall  
25 cause or tend to cause pollution of such waters according  
26 to the determination of the (DOE), as provided in this  
chapter.

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2 V

3 "Pollution" is defined in RCW 90.48.020 to include alteration of  
4 waters of the state in such a way as "is likely to . . . render such  
5 wastes harmful" in some way. Thus, the word is described in terms of  
6 the detrimental potential of discharges. It is not necessary that  
7 harm itself be shown in any case.

8 VI

9 On the record before us, we conclude that the discharge from the  
10 appellant's manure lagoon on May 7, 1986, caused pollution in  
11 violation of RCW 90.48.080. This is consistent with prior cases  
12 involving the discharge of manure. The conclusion is reinforced here  
13 by the existence of a documented violation of water quality  
14 standards. See Bollema Dairy v. DOE, PCHB No. 80-193 (1981); Kamstra  
15 Dairy v. DOE, PCHB No. 82-19 (1982); Jensen Kent Prairie Dairy v.  
16 DOE, PCHB No. 84-240 (1984); Meyer v. DOE, PCHB No. 83-13 (1985);  
17 Lundvall v. DOE, PCHB NO. 86-91 (2/19/87).

18 VII

19 RCW 90.48.450 requires that:

20 Prior to issuing a violation related to discharges from  
21 agricultural activity on agricultural land, the  
22 department shall consider whether an enforcement action  
23 would contribute to the conversion of agricultural land  
24 to non-agricultural uses.

25 The statute gives no hint of how, if at all, this consideration  
26 is to limit the agency's prosecutorial discretion, except to say:

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1 "Any enforcement action shall attempt to minimize the possibility of  
2 such conversion."

3 Here DOE did consider the matter. Moreover, no case was made  
4 that this enforcement action would contribute to non-agricultural use  
5 of the Vos dairy. We conclude there was no failure to comply with  
6 RCW 90.48.450.

7 VIII

8 RCW 90.48.144 authorizes the issuance of a penalty for the  
9 violation of RCW 90.48.080 of "up to ten thousand dollars a day for  
10 every such violation". The statutory ceiling on this penalty was  
11 raised as recently as 1985, reflecting a legislative intention to  
12 treat actions contravening the water pollution control statute with  
13 increased seriousness. Section 2, Chapter 316, Laws of 1985.

14 The principal purpose of civil penalties is to influence behavior  
15 and to deter future violations both by the perpetrator and by others  
16 in the same occupation.

17 Here, in light of the range of possible penalties, the amount  
18 selected appears to us in keeping with the statutory aims and  
19 reasonable for the May 7, 1986 offense. Mr. Vos has had a history of  
20 not properly managing the manure from his farm, causing pollution.  
21 He was aware that his lagoons were rapidly filling, yet made only a  
22 last-minute effort to obtain relief. Since the discharge, it is not  
23 clear that he has effected a permanent cure to the problem which will  
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1 prevent it from re-occurring. He has failed to accept responsibility  
2 for the significant serious pollution that resulted. A \$5,000  
3 penalty geared to influencing behavior is appropriate in this  
4 circumstance.

5 IX

6 Any Finding of Fact which should be deemed a Conclusion of Law is  
7 hereby adopted as such.

8 From these Conclusions the Board enters this  
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ORDER

Department of Ecology Notice of Penalty Incurred and Due, No. DE 86-610, assessing a penalty of \$5,000 is affirmed.

DATED this 5th day of May, 1987.

POLLUTION CONTROL HEARINGS BOARD

 5/6/87  
LAWRENCE J. FAULK, Chairman

  
WICK DUFFORD, Member

  
JUDITH A. BENDOR, Member

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